No. 80-1221

FEB 23 1981

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HARRY L. RIGGS, JR.,

Petitioner,

v.

THE BOARD OF TRUSTEES OF THE
OHIO STATE UNIVERSITY,

Respondent.

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Fourth Circuit**

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

WILLIAM J. BROWN
Attorney General
State of Ohio

BY: JOSEPH D. LONARDO
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216
(614) 464-6400

Special Counsel of Record
for Respondent

February 23, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

THE "QUESTIONS PRESENTED"

In his "Questions Presented," the Petitioner misstates the holdings of the courts below. The United States District Court for the Eastern District of Virginia, as affirmed *per curiam* by the United States Court of Appeals for the Fourth Circuit, does not, as Petitioner claims, put in issue the question of a state's engagement in a totally proprietary, non-governmental function.

As the premise for the first question presented, the Petitioner states that the immunity afforded Respondent under the Eleventh Amendment to the Constitution of the United States is not applicable because The Ohio State University, as the alter ego of the State of Ohio, is engaged in a "non-governmental function in an area pre-empted by Federal legislation." (Petition for Writ of Certiorari, p.6). But, the District Court (and the Fourth Circuit) concluded that "it is questionable whether the operation of an airport today, even through a university, can be considered outside the state's exclusive sphere in light of the widespread, almost complete in this country, governmental ownership of airports." (A-14).* The Court actually observed that The Ohio State University Airport was operated by the University primarily as a teaching facility and stated that under the pertinent case law no court had considered the operation of a college to be "outside a sphere exclusively the state's." (A-14).

And, while the Court indicated that the operation of an airport involves activities within interstate commerce, an area subject to federal regulation, the Court did not find this to be an area "pre-empted" by federal legislation.

---

* Any reference to the appendix (A-) is to the appendix of Petitioner in his petition for writ of certiorari.

Thus, the real issue presented in the first question is whether a state or its "alter ego" waives Eleventh Amendment immunity by engaging in an activity which is federally regulated. Moreover, because the Petitioner has conceded that The Ohio State University is the alter ego of the State of Ohio, the second question presented is merely whether purchase of a liability insurance policy constitutes a waiver of the state's Eleventh Amendment immunity.

TABLE OF CONTENTS

	PAGE
THE "QUESTIONS PRESENTED"	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	5
I. The Decision of the Court of Appeals Affirming the Opinion of the District Court that the Eleventh Amendment Immunity is not Waived by a State's Involvement in an Activity which is Federally Regulated is not a Question Justifying this Court's Review	5
II. The Decision of the Court of Appeals Affirming the Determination of the District Court that the Eleventh Amendment Immunity is not Waived by a State's Procurement of Insurance is not a Question Justifying Review by this Court	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: PAGE

Brennan v. *University of Kansas*, 451 F.2d 1287 (10th Cir. 1971) 13

Dawkins v. *Craig*, 483 F.2d 1191 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974) 7

Edelman v. *Jordan*, 415 U.S. 651 (1974) ... 6, 7, 8, 9, 10, 11, 12

Hamilton Mfg. Co. v. *Trustees of State Colleges in Colorado*, 356 F.2d 599 (10th Cir. 1966) 13

Hans v. *Louisiana*, 134 U.S. 1 (1890) 10

Huckins v. *Bd. of Regents of the Univ. of Michigan*, 263 F. Supp. 622 (E.D. Mich. 1967) 12

Korgich v. *Regents of the New Mexico School of Mines*, 582 F.2d 549 (10th Cir. 1978) 12

Lumbermens Mutual Casualty Co. v. *Fugate*, 569 F.2d 213 (4th Cir. 1978) 6

MacKethan v. *Commonwealth of Virginia*, 370 F. Supp. 1 (E.D. Va. 1974), *aff'd*, 508 F.2d 838 (4th Cir. 1974) 7

Medicenters of America, Inc. v. *Commonwealth of Virginia*, 373 F. Supp. 305 (E.D. Va. 1974) 13

Ohio Inns, Inc. v. *Nye*, 542 F.2d 673 (6th Cir. 1976), *cert. denied*, 430 U.S. 946 (1977) 12

Parden v. *Terminal R. Co.*, 377 U.S. 184 (1964) .. 7, 8, 9, 10

Williamson Towing Co., Inc. v. *State of Illinois*, 396 F. Supp. 431 (E.D. Ill. 1975), *aff'd*, 534 F.2d 758 (7th Cir. 1976) 7

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Amendment XI ... *passim*

STATUTES:

Ohio Rev. Code §2743.02 12

Ohio Rev. Code §3335.03 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1221

HARRY L. RIGGS, JR.,

Petitioner,

v.

THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, The Ohio State University ("Ohio State"), is a state institution of higher education created by and existing pursuant to the statutes of the State of Ohio. Ohio State was named as a third-party defendant[1] in four aviation tort claims (*Ottinger, Cohen, Luke,* and *Travelers*) brought against the Petitioner, Harry L. Riggs, Jr. The claims arose as a result of an incident in

---

[1] The Board of Trustees of The Ohio State University was named as the third-party defendant because it is the entity required by statute to be named in a suit brought against Ohio State. *See* Ohio Rev. Code §3335.03.

which a private aircraft, owned by Petitioner, crashed into a Virginia townhouse, killing its two occupants, Harry Ottinger and Sue Ottinger, and allegedly causing property damage and/or personal injury to the Cohens, the Lukes, and an insured of Travelers Insurance Company all of whom owned adjacent townhouses. As a result of this accident, the administrator of the estate of Mr. and Mrs. Ottinger instituted a wrongful death action against Petitioner in the United States District Court for the Eastern District of Virginia. The *Cohen, Luke* and *Travelers* cases were filed subsequent to the *Ottinger* case. The Plaintiffs asserted that Joseph Reid, the pilot, was the agent of Petitioner and that, as owner of the aircraft, the Petitioner was legally responsible for any negligence in the operation, control and maintenance of the aircraft.

In each case, Petitioner filed third-party complaints naming the Respondent as third-party defendant. By the complaints, Petitioner sought contribution or indemnity from Ohio State on two grounds: (1) that Pilot Joseph Reid, by virtue of his employment with Ohio State, was acting as an agent not only of Petitioner Riggs but also of Respondent Ohio State; and (2) that should liability attach to Petitioner by reason of negligent maintenance of the aircraft, Respondent should be liable because Petitioner's aircraft was hangared and maintained at The Ohio State University Airport.

Ohio State filed a Motion to Dismiss and/or for Summary Judgment on the grounds that Ohio State, as an instrumentality of the State of Ohio, could not be sued in federal court because of the provisions of the Eleventh Amendment to the Constitution of the United States. This issue was the subject of extensive discovery. Depositions of the Vice President of Finance and Plan-

ning at Ohio State, the Chairman of the Department of Aviation, and various Ohio State employees were taken; Requests to Admit and Interrogatories were answered; and documents were produced.

After briefs were submitted and oral arguments heard, Judge Bryan of the United States District Court for the Eastern District of Virginia issued a ten page Memorandum Opinion granting Ohio State's Motion to Dismiss and/or for Summary Judgment. Subsequent to the decision in *Ottinger* and *Cohen*, the *Luke* and *Travelers* cases were filed. Judge Bryan dismissed the latter two cases on the basis of his earlier decision.

Petitioner appealed the decisions to the Court of Appeals for the Fourth Circuit, where the four actions were consolidated for appeal. The Fourth Circuit, in a *per curiam* decision, affirmed Judge Bryan's Opinion.

In his Memorandum Opinion, Judge Bryan recited his detailed factual findings with respect to The Ohio State University and its airport which are important to a consideration of this case. As Judge Bryan noted, Ohio State is governed by a Board of Trustees appointed by the Governor of the State of Ohio with the advice and consent of the Senate. It is organized into 17 different Colleges and the Graduate School, and each of these 17 Colleges is further divided into various academic departments. One such department is the Department of Aviation, a department within Ohio State's College of Engineering.

Ohio State does operate an airport, called The Ohio State University Airport. The Airport is operated by the Department of Aviation. Indeed, the Chairman of the Department of Aviation is also the Manager of the University Airport. It is important to note that the

Department operates the Airport as a teaching laboratory for its academic programs. As stated by Judge Bryan: "Indeed, Ohio State has further indicated that the airport is operated by the university primarily as a teaching facility." (A-14). In this way, the missions of the University — teaching, research and public service — are fulfilled through the operation of this facility.

The University Airport has been characterized as a teaching laboratory analogous to the University Hospital operated by the University's College of Medicine and used to provide teaching and training facilities for its medical students. This analogy was recognized by both courts below when Judge Bryan noted at footnote 9: "It is helpful to consider analogously the University teaching hospital." (A-14).

Ohio State operates the Airport primarily to serve as a center for University flight training and academic research being conducted by the Department of Aeronautical and Astronautical Engineering within the College of Engineering. While the University Airport does not provide regular commercial service, some aviation services such as hangaring, tie down and maintenance are provided to the state and private aircraft based there. The University views the providing of such services as an enhancement to its ability to train its aviation students in a real world laboratory setting — much in the same manner as The Ohio State University Hospital is beneficial to its medical students.

The University owns approximately 23 aircraft which are used for student flight instruction. Although an additional 230 to 240 planes are based at the Airport, over 100 of those aircraft are owned by the State of Ohio through its Air National Guard, the State Highway

Patrol, the Governor's Office and the State of Ohio Department of Transportation. During each quarter at Ohio State, approximately 150 students are enrolled in courses for credit in the Department of Aviation, and approximately 50 to 70 persons are enrolled in flight training.

Ohio State charges and receives fees from flight instruction, charter service, sponsored research grants and other services provided by the Department of Aviation. The fees obtained from the operation of the Airport by the Department of Aviation, like the fees and charges of the University Hospital and College of Medicine, are unrestricted State funds. In fact, all funds received by Ohio State, be they restricted or unrestricted, are state funds and are subject to the expenditure policies and regulations of the State of Ohio and its Auditor.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

The Decision of the Court of Appeals Affirming the Opinion of the District Court that the Eleventh Amendment Immunity is not Waived by a State's Involvement in an Activity which is Federally Regulated is not a Question Justifying this Court's Review.

This case involves no novel issue of federal law justifying review by this Court. The case is merely a common law tort claim for damages brought in federal court against an instrumentality of the State of Ohio. Petitioner concedes that The Ohio State University is the "alter ego" of the State of Ohio and that this action is a suit against the State of Ohio. Thus, the applicability of the Eleventh Amendment to the Constitution of the United States to bar suits brought against Ohio State in federal court is not an issue.

The only issue Petitioner seeks to have this Court review is whether Ohio State's Eleventh Amendment immunity has been waived by the State of Ohio. This issue has been fully settled by decisions of this Court and those decisions have been uniformly followed by the courts which have considered this case and and by all the Courts of Appeals that have addressed these issues.

The United States District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit both concluded that there had been no waiver. In seeking a review of these holdings, Petitioner asserts that a waiver should have been found to exist because the State of Ohio entered into a sphere of activity which is federally regulated. However, this Court in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), clearly and explicitly laid to rest Petitioner's contention. In that case, this Court concluded that a state's involvement in activities which are subject to pervasive congressional regulation is not sufficient to constitute a waiver of the constitutional protection afforded by the Eleventh Amendment:

> The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts. 415 U.S. at 673.

This holding by the *Edelman* Court was recognized by Judge Bryan below and it has been consistently applied by the lower courts. *Lumbermens Mutual Casualty Co.* v. *Fugate*, 569 F.2d 213 (4th Cir. 1978) (acceptance and disbursement by a state of federal funds pursuant to Federal-Aid Highway Act does not waive immunity);

Dawkins v. *Craig*, 483 F.2d 1191 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974) (participation in federal AFDC program does not waive immunity); *Williamson Towing Co., Inc.* v. *State of Illinois*, 396 F. Supp. 431 (E.D. Ill. 1975), *aff'd*, 534 F.2d 758 (7th Cir. 1976) (maintenance by a State Department of Transportation of bridge involved in interstate commerce does not waive immunity); *MacKethan* v. *Commonwealth of Virginia*, 370 F. Supp. 1 (E.D. Va. 1974), *aff'd*, 508 F.2d 838 (4th Cir. 1974) (state involvement in securities regulation insufficient to waive immunity).

In light of *Edelman*, Petitioner's request for review is ironic. The question of whether entry into a federally regulated sphere of activity constitutes an implied waiver of Eleventh Amendment immunity is no longer unsettled. As stated by this Court: "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here." *Edelman*, 415 U.S. at 673.

Petitioner attempts to avoid *Edelman's* clear declaration that more than mere entry into a federally regulated activity is necessary before a waiver of Eleventh Amendment immunity can be found by relying upon this Court's prior holding in *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964). Petitioner's reliance upon *Parden*, however, is misplaced. There is no inconsistency between the decision in *Parden* and *Edelman*.

In *Parden* this Court addressed for the first time a state's claim of Eleventh Amendment immunity in an action brought against the state pursuant to an Act of Congress authorizing such a private right of action — The Federal Employers' Liability Act. *See Parden*, 377

U.S. at 187. Significantly, in that case, the express statutory right of action created by Congress included relief against a class of defendants that "literally included States or state instrumentalities." *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974). Under those circumstances, this Court recognized a waiver of Eleventh Amendment immunity.

In *Edelman*, however, this Court subsequently made clear that absent an *expressly created* cause of action, such as existed in *Parden*, an implied waiver of Eleventh Amendment immunity is not proper:

> Both *Parden* and *Employees* [411 U.S. 279 (1973)] involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities. Similarly, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, [359 U.S. 275 (1959)] involved a congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power "to contract, to sue, and be sued in its own name." The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity. 415 U.S. at 672.

Moreover, this Court delineated in *Edelman* that where no congressional cause of action exists, as in this case, *Parden* is inapplicable:

> But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent. Thus

> respondent is not only precluded from relying on this Court's holding in *Employees*, but on this Court's holdings in *Parden* and *Petty* as well. 415 U.S. at 672.

In the instant case *no congressional authorization* to sue a class of defendants literally including the State of Ohio exists; hence, Petitioner, like the Respondent in *Edelman*, is precluded from relying upon the holding in *Parden*. As stated by Judge Bryan:

> Here the State of Ohio through its airport participates in activities involving interstate commerce — certainly an area subject to pervasive federal regulation. Yet under *Edelman* such participation is insufficient alone to constitute the necessary express or overwhelming implied statement of waiver. (A-13).

This action clearly falls within the principles set forth in *Edelman*.

Petitioner further seeks to avoid *Edelman's* holding by intimating that this matter may be covered by the Federal Aviation Act. Again, this Court has made clear that despite agreements to participate in and administer federal programs in compliance with federal laws, a waiver of Eleventh Amendment immunity will be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " 415 U.S. at 673.

Certainly, the Federal Aviation Act, contrary to Petitioner's suggestion, is not a statute which either by "express language" or "overwhelming implications" establishes consent on the part of the state to be sued in federal court. The Act does not authorize a private right of action against any defendants, let alone a *state* defendant. Again, as the District Court correctly stated,

Petitioner's attempts to cure this "defect" in the Federal Aviation Act, by reference to an implied right of action, is unequivocally precluded by *Edelman:*

> While whether the Federal Aviation Act confers a private right of action is debatable, such a right of action, implied as it must be, is insufficient to constitute an intent of Congress "to abrogate the immunity in question." As the Court explained in *Edelman:*
>
> > [W]hile the Court has, in cases such as *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant. 415 U.S. at 673-674.
>
> (A-13).

More importantly, whether or not an implied right of action could or should be implied under the Federal Aviation Act is simply irrelevant to this case. As Judge Bryan correctly observed, Petitioner has not alleged any violation of a federal regulation; he has not even attempted to allege an implied right of action under the Federal Aviation Act. Petitioner has asserted nothing more than a common law aviation tort against the State of Ohio in federal court. It was precisely this situation that the Eleventh Amendment was designed to prevent. *See Hans* v. *Louisiana*, 134 U.S. 1 (1890).

In short, then, it is clear that under this Court's holdings in *Parden* and *Edelman*, waiver of a state's constitutional immunity cannot be premised merely upon entry into a sphere of federally regulated activity. More importantly, in a case such as the instant one,

where no specific, congressionally authorized cause of action is present, waiver will not be implied. The language of *Edelman* is clear — waiver of Eleventh Amendment immunity can only arise by virtue of "express language" or "overwhelming implications." These factors are simply not present here. The United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit correctly applied the Eleventh Amendment immunity waiver doctrines as enunciated by this Court. No conflict exists between their decisions and the holdings of this Court or those of other circuits. Petitioner's own dissatisfaction with the principles enunciated by this Court is simply not grounds for granting certiorari.

II.

The Decision of the Court of Appeals Affirming the Determination of the District Court that the Eleventh Amendment Immunity is not Waived by a State's Procurement of Insurance is not a Question Justifying Review by this Court.

Petitioner also urges review of the well-reasoned decisions below because of his allegation that in the instant case there will be no impact on the treasury of the State of Ohio. As noted above, Petitioner concedes that The Ohio State University is the alter ego of the State of Ohio. Thus, once again there can be no question of the applicability of the Eleventh Amendment. For it not to apply, the procurement of a liability insurance policy must constitute a waiver of the constitutional protection. But once again, Petitioner's attempt to imply waiver from the existence of an insurance policy runs afoul of the express waiver doctrine of *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

In cases decided both before and after *Edelman*, lower courts have uniformly held that the procurement of insurance does not constitute a waiver of a state's

constitutional immunity. As the Court correctly reasoned in *Huckins* v. *Bd. of Regents of the Univ. of Michigan*, 263 F. Supp. 622, 624 (E.D. Mich. 1967):

> Even if the existence of liability insurance had amounted to a waiver of immunity from suit, the State of Michigan did not consent to such suit in the federal court.

See also Korgich v. *Regents of the New Mexico School of Mines*, 582 F.2d 549 (10th Cir. 1978) (no waiver of Eleventh Amendment immunity from existence of an insurance policy).

The refusal of lower courts to find waiver premised upon the existence of an insurance policy is based upon sound reasoning. A state may, after all, waive its *sovereign* immunity without waiving its Eleventh Amendment immunity. *See Edelman* v. *Jordan*, 415 U.S. 651, 677, n.19 (1974). The State of Ohio has, for example, qualifiedly waived its sovereign immunity to the extent that it has consented to be sued in a forum expressly created to hear suits brought against the state or its instrumentalities. Ohio Rev. Code §2743.02.[2] In this regard, a federal court in Ohio has specifically held that the Court of Claims Act, qualifiedly waiving Ohio's sovereign immunity with respect to those claims submitted to that Court, does not constitute a waiver with respect to actions pending in federal or other state courts. *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673 (6th Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

---

[2] That statute provides in pertinent part:

> (A) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter.

Because of this waiver of sovereign immunity, states such as Ohio have deemed it advisable to procure insurance in certain circumstances. But, a state cannot and should not be deemed to have waived its *constitutional* immunity because it chooses to protect itself from the financial consequences inherent in the abrogation of *sovereign* immunity. Such a result would constitute an interference with the state's internal operations and sovereign decision-making in direct contravention of the concept of federalism embodied in the Eleventh Amendment. Such a result would also be contrary to the decisions reached by all courts which have held that a state can waive sovereign immunity and subject itself to liability in its own courts without relinquishing its Eleventh Amendment immunity from suits in federal courts. *Brennan* v. *University of Kansas*, 451 F.2d 1287 (10th Cir. 1971); *Hamilton Mfg. Co.* v. *Trustees of State Colleges in Colorado*, 356 F.2d 599 (10th Cir. 1966); *Medicenters of America, Inc.* v. *Commonwealth of Virginia*, 373 F. Supp. 305 (E.D. Va. 1974).

Under the clear dictates of *Edelman*, there has been no conflict among the lower courts that have addressed this issue. Moreover, under the circumstances of the instant case, such an issue hardly rises to the status of an important question of law which warrants review by this Court.

CONCLUSION

For the reasons set forth, there are no grounds for granting a writ of certiorari and reviewing the opinion and judgment of the United States Court of Appeals for the Fourth Circuit and of the United States District Court for the Eastern District of Virginia. The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General
State of Ohio

BY: JOSEPH D. LONARDO
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216
(614) 464-6400

Special Counsel of Record
for Respondent

LARRY R. THOMPSON
SUZANNE K. RICHARDS
VORYS, SATER, SEYMOUR
AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216

Counsel

February 23, 1981